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June 19, 2006

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JUN 20 2006

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Federal Communications Commission
Office of Secretary

Re: Joint Petition of Accipiter Communications,
Inc. and Qwest Corporation for Waiver of the
Definition of "Study Area" of the Appendix-
Glossary of Part 36 of the Commission's Rules,
Petition for Waiver of Sec. 69.3(e)(11) of the
Commission's Rules. CC Doc. No. 96-45


Dear Ms. Dortch:

Attached please find an original and four copies of the Joint Petition of Accipiter Communications, Inc. and Qwest Corporation for Expedited Waiver of the Definition of "Study Area" being filed by The Petition also includes a request by for waiver of Section 69.3(e)(11) of the Commission's Rules.

The requisite filing fee and FCC Form 159 Remittance Advice is being submitted by Courier to Mellon Bank, Pittsburgh, Pennsylvania on this date.

Please acknowledge receipt on the "stamp and return" duplicate document attached for this purpose. Please contact me if there are any questions regarding this matter.

Sincerely yours



David Cosson
Counsel to Accipiter Communications, Inc.

Cc: Katy King
Gary Seigel

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JUN 20 2006

READ INSTRUCTIONS CAREFULLY
BEFORE PROCEEDING

FEDERAL COMMUNICATIONS COMMISSION
REMITTANCE ADVICE

Approved by OMB
3060-0589


Federal Communications Commission: Page 1 of 1

(1) LOCK BOX # <div style="font-size: 1.5em; font-family: cursive;">358140</div>		Office of Secretary SPECIAL USE ONLY FCC USE ONLY	
SECTION A - PAYER INFORMATION			
(2) PAYER NAME (if paying by credit card enter name exactly as it appears on the card) Accipiter Communications, Inc.		(3) TOTAL AMOUNT PAID (U.S. Dollars and cents)	
(4) STREET ADDRESS LINE NO. 1 2238 West Lone Cactus Dr.			
(5) STREET ADDRESS LINE NO. 2 Suite 100			
(6) CITY Phoenix		(7) STATE AZ	(8) ZIP CODE 85027
(9) DAYTIME TELEPHONE NUMBER (include area code) 928 501 5201		(10) COUNTRY CODE (if not in U.S.A.)	
FCC REGISTRATION NUMBER (FRN) REQUIRED			
(11) PAYER (FRN) 0004269883		(12) FCC USE ONLY	
IF MORE THAN ONE APPLICANT, USE CONTINUATION SHEETS (FORM 159-C) COMPLETE SECTION BELOW FOR EACH SERVICE, IF MORE BOXES ARE NEEDED, USE CONTINUATION SHEET			
(13) APPLICANT NAME Accipiter Communications, Inc.			
(14) STREET ADDRESS LINE NO. 1 2238 West Lone Cactus Dr.			
(15) STREET ADDRESS LINE NO. 2 Suite 100			
(16) CITY Phoenix		(17) STATE AZ	(18) ZIP CODE 85027
(19) DAYTIME TELEPHONE NUMBER (include area code) 928 501 5201		(20) COUNTRY CODE (if not in U.S.A.)	
FCC REGISTRATION NUMBER (FRN) REQUIRED			
(21) APPLICANT (FRN) 0004269833		(22) FCC USE ONLY	
COMPLETE SECTION C FOR EACH SERVICE, IF MORE BOXES ARE NEEDED, USE CONTINUATION SHEET			
(23A) CALL SIGN/OTHER ID	(24A) PAYMENT TYPE CODE BEA	(25A) QUANTITY 1	
(26A) FEE DUE FOR (PTC) \$6,840.00	(27A) TOTAL FEE \$6,840.00	FCC USE ONLY	
(28A) FCC CODE 1		(29A) FCC CODE 2	
(23B) CALL SIGN/OTHER ID	(24B) PAYMENT TYPE CODE	(25B) QUANTITY	
(26B) FEE DUE FOR (PTC)	(27B) TOTAL FEE	FCC USE ONLY	
(28B) FCC CODE 1		(29B) FCC CODE 2	
SECTION D - CERTIFICATION			
CERTIFICATION STATEMENT I, <u>David Cossow</u> , certify under penalty of perjury that the foregoing and supporting information is true and correct to the best of my knowledge, information and belief. SIGNATURE <u>David Cossow</u> DATE <u>6/19/06</u>			
SECTION E - CREDIT CARD PAYMENT INFORMATION			
MASTERCARD _____ VISA _____ AMEX _____ DISCOVER _____ ACCOUNT NUMBER _____ EXPIRATION DATE _____ I hereby authorize the FCC to charge my credit card for the service(s)/authorization herein described. SIGNATURE _____ DATE _____			

012581

				05/31/2006	12581
<u>Invoice No.</u>	<u>Date</u>	<u>Invoice Amount</u>	<u>Debit Memo Amt</u>	<u>Description</u>	
05312006	05/31/2006	\$6,840.00	\$0.00	FCC WAIVER FILING	\$6,840.00

ACCIPITER COMMUNICATIONS INC.

 <p>ACCIPITER COMMUNICATIONS INC. 2238 WEST LONE CACTUS DRIVE - SUITE 100 PHOENIX, AZ 85027</p>	<p>BANK OF AMERICA ARIZONA PHOENIX, AZ 85003</p>		<p>012581</p>
	<p>91-170 1221</p>	<p>CHECK NO.</p>	<p>12581</p>
<p>PAY EXACTLY</p>	<p>***Six Thousand Eight Hundred Forty And 00/100***</p>		
<p>TO THE ORDER OF</p>	<p>FEDERAL COMMUNICATIONS COMMUSSION-D.C. 445 12TH ST., S.W. WASHINGTON DC 20554</p>		
	<p>DATE 05/31/2006</p>	<p>AMOUNT \$6,840.00 **</p>	<p><i>Charles Lowden</i></p>

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Accipiter Communications, Inc.

and

Qwest Corporation

Joint Petition for Waiver of the
Definition of “Study Area” of the
Appendix-Glossary of Part 36 of the
Commission’s Rules

CC Docket No. 96-45

JOINT PETITION FOR EXPEDITED WAIVER

Pursuant to Section 1.3 of the Federal Communications Commission’s (“FCC” or “Commission”) Rules,¹ Accipiter Communications, Inc. (“Accipiter”) and Qwest Corporation (“Qwest”) (collectively, “Petitioners”), by their attorneys, request a waiver of the definition of “study area” contained in the Appendix—Glossary of Part 36 of the Commission's Rules.

Petitioners request this waiver in order to extend Accipiter’s existing study area in Arizona to include the portion of the Vistancia development in northwest Maricopa County not within its current study area and to remove the same area from Qwest’s study area. The portion of Vistancia that is the subject of this Petition is currently in Qwest’s study area, but Qwest has

no facilities and provides no service there.² A number of the existing homes in the area obtain telephone service from Cox Communications, which is not an ILEC and is not designated as an Eligible Telecommunications Carrier.

The Commission is requested to review and approve this Petition expeditiously. The facts and circumstances supporting grant are similar in material respects to those involved in the Commission's *Skyline* Order.³ Prompt Commission approval will enable Petitioners to focus time and resources on its preparations for constructing and operating facilities in the area.

I. INTRODUCTION AND SUMMARY

Qwest is a price cap incumbent local exchange carrier ("ILEC") that owns and operates approximately 2,085,000 access lines in Arizona. If this Petition is approved, Qwest will continue to provide local telephone service to the same number of access lines and will retain the remainder of its study area.⁴

Accipiter owns and operates, as a cost study ILEC, approximately 220 access lines in one exchange in the state. It intends to bring the additional area into its ILEC study area as a new exchange. On February 15, 2005, the Arizona Corporation Commission adopted an Opinion and Order in its Docket No. T-02847A-02-0641 granting Accipiter's request to extend its

¹ 47 C.F.R. § 1.3.

² Accipiter's Study Area Code is 452191, Qwest's code is 455101.

³ *M&L Enterprises, Inc., d/b/a Skyline Telephone Company, Petition for Waiver of Sections 36.611, 36.612, and 69.2 of the Commission's Rules, Order, 19 FCC Rcd 6761 (2004) ("Skyline")*.

Certificate of Convenience and Necessity to include a portion of a proposed master-planned development, now known as Vistancia that was not then within Accipiter's service area. In the course of the proceeding before the ACC, Qwest agreed to transfer four sections from its certificated service area to Accipiter.⁵ The ACC approval was conditioned upon Accipiter establishing a new exchange in the extension area and modifying its existing EAS agreement with Qwest to provide two-way EAS with the Metro Phoenix Calling Area. Accipiter has accepted these conditions. Since release of the order, Accipiter has been focused on resolution of issues relating to exclusive right-of-way agreements between the developers and Cox Communications. Those issues have now been resolved.

As will be discussed in more detail below, the factors that the Commission requires for a study area waiver are or will be all present in this case: (1) the transfer of the area from the Qwest study area to Accipiter's study area will not adversely impact the Universal Service Fund ("USF"), (2) a statement will be obtained from the ACC that it does not object to the change of study areas, and (3) the public interest will be served by granting the waiver.

Because Qwest has no customers in the area to be reassigned, Accipiter will not provide the anti-slamming notices required by Section 64.1120 of the Commission's rules.

II. WAIVER OF THE FROZEN STUDY AREA DEFINITION IS WARRANTED.

⁴ Because Qwest has no service or facilities in the area, it does not plan to make any adjustments to its price cap indices.

⁵ The legal description of the area is: All of Sections 25, 26 and 35, Township 5 North, Range 1 West, and Section 30, Township 5 North, Range 1 East, of the Gila and Salt River Base and Meridian, Maricopa County, Arizona.

Petitioners seek a waiver of the frozen study area definition. Part 36 of the Commission's Rules "freezes" the definition of "study area" to the boundaries that were in existence on November 15, 1984. Although the rule was adopted to prevent a carrier from segregating territories artificially to maximize high cost support,⁶ the Commission has recognized that changes "that result from the purchase or sale of exchanges in arms-length transactions" do not necessarily raise the concerns which prompted the freeze.⁷ Although not a sale, the transfer of the portion of Qwest's study area to Accipiter is an arm's length transaction.

The Commission has recognized that failure to waive the rule in the case of the sale of exchanges would produce an absurd result, forcing the seller to continue to include exchanges in its study area for which it has no costs, and preventing the buyer from including in its study area exchanges it actually serves.⁸ Such a result would not serve the Commission's policy objective of ensuring that carriers' actual costs are reflected in their accounting so that they can accurately set just, reasonable and non-discriminatory rates. Logically, the same principles should apply to Accipiter's proposed extension of its study area. Therefore the standards for waiver of the freeze are met in this instance.

A. The Change in Study Area Boundaries Will Not Adversely Affect the Universal Service Fund.

⁶ See MTS and WATS Market Structure, Amendment of Part 67 of the Rules and Establishment of a Joint Board, Recommended Decision & Order, 57 RR 2d 267, ¶ 65 (1984).

⁷ See, e.g., Alltel Corporation Petition for Waiver of Section 36.125(f), Sections 36.154(e)(1) and (2), and the Definition of "Study Area" contained in Part 36, Appendix-Glossary of the Commission's Rules, Memorandum Opinion and Order, 5 FCC Rcd 7505, ¶ 7 (Com. Carr. Bur. 1990).

⁸ *Amendment to Part 36 to the Commission's Rules and Establishment of a Joint Board*, Notice of Proposed Rulemaking, 5 FCC Rcd 5974, 5975-76 (1990) ("Part 36 NPRM").

To evaluate whether a study area boundary change adversely impacts the USF, the Commission analyzes whether a study area waiver will result in an annual aggregate shift in high-cost support in an amount equal to or greater than one percent of the total high-cost support fund for the year.⁹ Although Section 54.305 of the Commission's rules is not applicable to this Petition because there was no transfer of customers or facilities,¹⁰ the extension of Accipiter's study area will produce no such adverse impact.

Accipiter estimates that upon construction of facilities and the offering of service in the extension area, its will be eligible for approximately \$177,172 in additional universal service high cost support in 2006.¹¹ Second, Accipiter expects its interstate common line support ("ICLS") will decrease by approximately \$7,014 and its Local Switching Support will decrease by \$45.¹² It is, therefore, inconceivable that Accipiter's additional support could rise to \$42 million—the figure that now approximates an aggregated one percent increase of annual high

⁹ See, e.g., U S WEST Communications, Inc., and Eagle Telecommunications, Inc., Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules, Memorandum Opinion and Order, 10 FCC Rcd 1771, 1774, ¶ 14 (1995).

¹⁰ *Skyline* at para. 16. In any event, Qwest currently receives only Interstate Access support of less than \$0.50 per line.

¹¹ See 47 C.F.R. § 54.305(b)-(f). This estimate is a maximum. Accipiter is exploring alternative means of providing service to determine the most cost effective technology over the long run.

¹² See, 47 C.F.R. 54.902(b)

cost support.¹³ Accordingly, this transaction is a non-event for purposes of the USF.

B. State Commission Approval.

The ACC's Order has already approved the extension of Accipiter's service area and the reduction of Qwest's service area. Petitioners will obtain an statement from the ACC that it does not object to the grant of this Petition.

C. Granting The Waiver Is In The Public Interest.

The transfer of the extension area from Qwest to Accipiter will promote the public interest because it will provide the customers with new services from a locally-based carrier specializing in meeting the communications needs of the rural communities it serves.

Accipiter intends to provide quality basic services to the new exchange. Accipiter's present plan is to install a fiber-to-the-home system, however it may utilize other technology if its studies show a comparable service level can be provided in a most cost effective manner. The new facilities will offer a full menu of basic and advanced voice and Broadband services.

III. WAIVER OF SECTION 69.3(e)(11) OF THE COMMISSION'S RULES IS WARRANTED.

Accipiter also requests a waiver of Section 69.3(e)(11), if necessary, in order to continue to allow it to use NECA as its tariff pool administrator. Section 69.3(e)(11) requires that any changes in NECA common line tariff participation resulting from a merger or acquisition of telephone properties are to be made effective on the next annual access tariff filing effective date following the

¹³ USAC's most recent projections show annual high cost support exceeding \$4.2 billion. See USAC, HC01 - High Cost Support Projected by State by Study Area - 2Q2006.xls, online at <http://www.universalservice.org/> ("USAC HC01").

merger or acquisition. Because there is no merger or acquisition, per se, Section 69.3(e)(11) does not appear applicable. Should the Commission conclude otherwise however, the rule may preclude Accipiter from participating in the NECA common line tariff until the next annual access tariff filing effective date following the consummation of the acquisition transaction. This would require Accipiter to file interstate tariffs, and assume the cost and administrative burden associated with that process for a brief period. Moreover, the inclusion of the small number of additional access lines in the NECA carrier common line tariffs would represent a minimal increase in NECA common line pool participation and would not unduly increase the complexity of administering the LTS program.¹⁴

In light of the fact that Accipiter is a very small carrier and that the administrative and financial burdens that could result in the absence of a waiver are great, Accipiter requests a waiver of Section 69.3(e)(11) to the extent necessary for it to add the new exchange to its current study area and include the lines in the NECA pools upon approval of this Petition.¹⁵

V. CONCLUSION

Good cause having been shown, Petitioners respectfully request that this Joint Petition be granted on an expedited basis, thereby allowing the extension of Accipiter's service to the entire Vistancia development

¹⁴ See, e.g., *Saddleback Communications and Qwest Corporation*, Order, 16 FCC Rcd 21159, 21166 (Acc. Pol. Div. 2001) (Commission granted waiver of Section 69.3(e)(11) for the acquisition of approximately 2700 access lines).

¹⁵ Accipiter will request NECA to provide a statement for the record that it does not objection to the addition of these lines to the pool.

Respectfully submitted,


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June 19, 2006